IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

RFA No.297 of 1997.
Reserved on:11.05.2007.
Date of decision: June 18, 2007.

Jagdish Ram and Others. **….Appellants**

Versus

State of H.P. and others **……Respondents.**

Coram

The Hon'ble Mr.Justice Dev Darshan Sud, J.

Whether approved for reporting?[1] *Yes.*

For the Appellants: **Mr.Rajnish Maniktala, Advocate.**

For Respondents 1-3: **Mr.Virender Verma, Additional Advocate General.**

For Respondent No.4: **Mr.K.D. Sood, Advocate.**

Dev Darshan Sud, J.

This is plaintiffs' appeal against the judgment and decree of the learned District Judge, Bilaspur, dismissing the suit of the plaintiffs for compensation.

Facts of the case:

Brief facts of the case are that Smt.Soma Devi, wife of the first plaintiff and mother of plaintiffs No.2 to 5, was motivated for a family planning operation by the defendants. The plaintiffs have pleaded that defendants No.4 and 5 were in-charge of the operation/surgery and actual surgery of

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[1] ***Whether reports of Local Papers may be allowed to see the judgment? Yes.***

tubectomy was performed on Smt.Soma Devi by defendant No.4. It has been pleaded that no proper medical care was taken and the plaintiff's wife, who was hale and hearty, died as a result of negligence of defendant No.4 who performed surgery on her. The plaintiffs have alleged that there were no proper facilities for surgery at Civil Dispensary, Kalol and nor any Anesthetist was attending the patients.

In reply, the defendants denied any negligence and pleaded that the surgery was performed under local and I.V. Anaesthesia. It was submitted that defendant No.4 was an experienced surgeon who had performed hundreds of surgical procedure and Smt.Soma Devi died of anaphylactic shock resulting from the administration of anaesthesia. The defendants pleaded that the best possible medical care had been provided to the deceased and that there was no negligence in performing the tubectomy operation or after care, emergency medical treatment rendered to the deceased.

The suit was filed in this Court, but with the increase in the pecuniary jurisdiction of this Court, it was transferred to the Court of the District Judge, Bilaspur.

Four issues were framed by this Court. The first issue was, whether Smt.Soma Devi had died for reasons beyond the control of defendant No.1 and its functionaries? The second was, as to whether death of Smt.Soma Devi was direct consequence on the negligence

of defendants in general and defendants No.4 and 5 in particular? The third and fourth issues related to the quantum of damages.

The learned trial Court, after consideration of the entire evidence, dismissed the suit of the plaintiff holding that the defendants had proved that there were proper arrangements in the operation theater and the doctor who performed the surgery was competent as he had conducted about 700 tubectomy operations and about 300 vasectomy operations. When the condition of Smt.Soma Devi deteriorated, he immediately administered artificial respiration and medicines, but of no avail. The learned trial Court, in order to reach its conclusion, considered the evidence of the parties, and judgments cited before it on the question of degree of care required etc.

I have heard learned counsel for the parties and have gone through the record.

On the first two issues, the learned trial Court has not at all considered the evidence on record. The findings are contrary to the documentary and oral evidence. The judgment itself is sketchy as it reproduces only some of the passages from the case law cited without considering the factual matrix of the case. There is no proper appraisal of the facts nor of the application of the principles of law. The documents on record show that Smt.Soma Devi was admitted on 12th December, 1984 at 11.00 A.M. for

surgery. The bed-head ticket Ex.DW-1/A, which records the medication administered to her and the tubectomy performed on her, is quite revealing. It has been produced and proved in evidence by DW-1, Dr.Paras Ram Katwal and contains the pre-operative/post operative notes of the treatment given to the deceased. The learned trial Court has not even cared to have a cursory glance through this document in order to arrive at the findings which have been rendered by it. There is nothing in this document which shows that any sensitivity test for the anaesthesia was performed on Smt.Soma Devi. It records; (i) that the blood pressure is normal, (ii) the pulse is also regular, and there is no abnormality in the chest and heart. Below this is a note in the following terms, *"S.P. Sensitivity to be done".* Whether this test was actually carried out or not or any attempt made, is not recorded. The pre-medication to be given half an hour before sending the deceased to the operation theater is recorded as (i) injection atropine and (ii) injection morphine. The reverse of this document contains the notes of the time when the deceased was sinking. It shows that at around 3.30 P.M., the deceased was having a weak pulse respiration was about 10 per minute. At this stage, emergency medication was administered to the deceased. At around 3.45 P.M., the condition further deteriorated and mouth to mouth artificial respiration was given. In-spite of all

these efforts, the patient did not show any improvement and therefore, was referred to the District Hospital for further treatment. This was done at about 4.30 P.M. This is the entire record of the treatment given to the deceased. It is in the light of this documentary evidence that the statements of the defence witnesses are to be considered.

DW-1, (defendant No.4) Dr.Paras Ram Katwal, stated that he has ample experience of performing family planning. He states that there is a well equipped operation theater at Kalol where the surgery was performed and that it has been functional for the last about 15 years. He admits that Ex.DW-1/A has been filled-in in his hand and has been signed by him and that the various steps taken by him before performing the tubectomy on the deceased have been entered by him in this document in his own hand. He states that after the surgery had been completed, the Pharmacist informed him that Smt.Soma Devi's pulse was weak and slow. He examined her and prescribed the treatment. This has also been entered in the bed-head ticket. When the condition of Smt.Soma Devi did not show any improvement, she was referred to District Hospital at Bilaspur. According to him, when they were about $4^{1/2}$ kilometers from Bilaspur, Smt.Soma Devi died due to cardio-respiratory failure as a reaction of Xylogaine 2% which had been administered as a local anaesthesia for conducting the tubectomy operation. He is

categoric in stating that he performed sensitivity test to determine whether it was safe to administer such anaesthesia although, he admits that there was no anesthetic expert at Kalol on that day. He states that usually Medical graduates are competent to administer local anaesthesia. The evidence of this witness cannot be believed as Ex.DW-1/A does not show any sensitivity test having been performed, the amount of anaesthesia administered as a test dose and the time for which any reaction was observed or the actual dosage of anaesthesia at the time of surgery. It is unfortunate that this witness should state on oath that which does not find support from a very vital piece of evidence Ex.DW-1/A which is the bed-head ticket recording the entire treatment and which admittedly is in his hand.

DW-2, Dr.Vinod Bhargava, was the Principal-cum-Director, Indira Gandhi Medical College, Shimla. DW-3 was Dr.C.Madhav Ram, Professor in Forensic Medicine at the Indira Gandhi Medical College, Shimla, DW-4, Dr.I.D. Santoshi, was Associate Professor in Anaesthology in the Medical College and DW-5 and DW-6 were Dr.T.R. Bhardwaj, Director Health Services and Dr.S.K. Dass Gupta, respectively. They have been produced by the defendants to prove Ex.DW-2/D, which are the findings of the Expert Committee, composed on the orders of the Commissioner-cum-Secretary(Health & F.W.) to the Government of Himachal Pradesh,

constituted to elicit expert technical opinion regarding the death of late Smt.Soma Devi. The composition of the Committee makes an impressive reading. Ex.DW-2/D, which is the report rendered by this Committee under the signatures of Dr.Vinod Bhargava (DW-2), purports to conclude on the basis of expert opinion the reasons for the death of late Smt.Soma Devi. The report being short is reproduced hereunder:-

> *"The clinical record of the case was apprised by Dr.R.K.Sharma Director Health Services and the first hand clinical information of the case was provided by Dr.P.R. Katwal, Medicala Officer of Jhandutta Primary Health Centre and Dr.P.R. Sankhyan and autopsy findings were provided by Dr.T.R. Bhardwaj, Chief Medical Officer, Bilaspur District.*
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> *After a careful review and discussions of the circumstances of the case all the members have come to the following unanimous and considered conclusions:-*
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> *It is evident from the clinical records as well as from autopsy report that the patient Soma Devi wife of Shri Jagdish Chand, resident of village Bakian post office Kalol, Tehsil Ghumarwin, District Bilaspur, Himachal Pradesh, died due to severe anaphylactic shock as a result of lignocain which was given to her for local anaesthesia.*

> *The selection of the case was proper and pre-anaesthetic check-up was found to be proper. Also the pre-anaesthetic regime was found normal and usual clinical doses have been given to the deceased. This was followed by injection lignocain in correct therapeutic dosses (6 ml.of 2% lignocain with adrenaline).*
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> *Intolerance (hypersensitivity reaction) to lignocain resulted in severe anaphylactic reaction soon. Proper resuscitation measures were promptly and adequately instituted but inspite of these measures, she died in around 4 hours of the reaction.*
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> *It is well known that individual susceptibility is one of the major factor causing this reaction. Proper sensitivity test has been performed and revealed a negative response, however, this does not rule out drug sensitivity and this type of reactions have been reported in world literature".*

In order to prove this record, the defence witnesses have stated that the selection of the anaesthesia as also the dose which was administered was proper. Prima-facie, the report may be seen beyond the pale of judicial scrutiny as it has been authored and submitted under the authority of experts. However, when the witnesses are tested in cross-examination, there is nothing on the record to show that this report Ex.DW-2/D is based on existing facts.

Dr.Vinod Kumar Bhargava (DW-2) is unable to explain as to from where he has concluded that the sensitivity test was carried out, or the doses and quantity of anaesthesia which was administered. To similar effect is the testimony of DW-4 Dr.I.D. Santoshi, who after having stated in examination-in-chief of the evidence that a particular dose of anaesthesia was administered, is unable to state as to from where he has derived this information or whether it is on the record. The testimony of these witnesses is to be rejected outright as being a mere fabrication of facts. When tested on the anvil of cross-examination, DW-2, Dr.Vinod Bhargava, after stating about his achievements in the field of medicine, states that during the deliberations of the Committee, the postmortem report (Mark `X' as it had not been exhibited at that time), bed-head ticket (DW-1/A) and Chemical Examiner's report (Ex.DW-2/A) were considered. He also states that these documents indicated that test dose of lignocaine has been given to the patient to check her hypersensitivity. In Cross-examination he states that these are documents examined by the Board including himself, but he could not state as to what dose was administered on the deceased in order to determine hypersensitivity. He also could not state as to at what time the dose was administered and for what period the sensitivity reaction was observed. He supports his opinion

regarding reaction of drugs from an article published in Journal of Forensic Medical and Toxicology, Vol.IV. None of the documents Ex.DW-1/A, the Chemical Examiner Report Ex.DW-2/A and the postmortem report Ex.DW-5/A show as to whether lignocaine was actually administered to check the sensitivity of the drug. In-fact, the pre-operative notes do not even show as to whether this drug was administered both to check-up the sensitivity or as a drug for performing the surgery. DW-2/A is the Chemical Examiner's report which only states that no poison had been found in the sample sent for analysis. As per the postmortem report Ex.DW-5/A, the opinion is *"patient died of cardio-respiratory failure due to shock".* The column requiring regarding the probable time that elapsed between the injury and death contains over-writing. The material from where this witness concluded that the sensitivity test was performed is not on record and there is no material to support it. Only these three documents were produced before the Committee. His statement is to be rejected outright as being fabricated.

DW-3, Dr.C.Madhav Ram is more forthright in his testimony and admits in cross-examination that the record does not disclose the time and the quantity of administration of the anaesthetic dose. He admits that it is not reflected from the record nor it is

indicated therein to show for how long the patient has been observed etc.

DW-4, who at the relevant time was the Associate Professor in Anaesthology, has not deposed on facts. His statement that according to the record, 6 ml. of 2% Xylocaine was administered has been given in the ultimate report submitted by DW-2, cannot be believed. He has no knowledge regarding the test which was performed nor any record supporting his testimony. How and under what circumstances, he has submitted on oath that the necessary doses were administered and tests were carried out and that the anaesthesia was administered, is not clear. Rather it can be said that facts have been fabricated. To similar effect are the testimonies of DW-5 and DW-6. The lesser said about the report of these experts the better. It is nothing but fabrication and concoction of facts and an attempt to suppress the truth. None of the documents referred to namely; the bed-head ticket (DW-2/A), the postmortem report (Ex.DW-5/A) and Chemical Examiner's report (Ex.DW-2/A) do not show administration of the anaesthesia in any dose whatsoever. There is no indication as to whether any sensitivity test has been performed and the quantity of anaesthesia which was administered either as an anaesthetic dose to test sensitivity or as a local anaesthesia for the performance of surgery. In these

state of affairs, the report Ex.DW-2/D deserves outright rejection. The lesser said about these witnesses the better as they want to overawe the ultimate decision of this Court merely by their qualifications and the posts which they hold in the Medical College. Even the learned Trial Court, has not cared to look at the documentary and oral evidence to come to a just and proper conclusion. The findings arrived at to say least are perverse and cannot be sustained on any count.

Of the other two documents; namely; the Chemical Examiner's Report Ex.DW-2/A and the Postmortem report Ex.DW-5/A, there is nothing to indicate that any test for checking the sensitivity of anaesthesia was performed and that a particular quantity was administered. Of the two documents placed on record dealing with the question of anaphylactic shock; namely; DW-2/C and Ex.DW-2/B are extract photocopies from some journals, they deal with the administration of penicillin and not anaesthesia. Even a layman knows that penicillin is an antibiotic and not anaesthesia as used in surgery. These documents cannot be accepted for the reasons that part of photocopy has been placed on record and secondly they do not deal with the effects of administration of anaesthesia used in the surgery performed on the deceased or any other kind of anaesthetic. In the circumstances, I hold that the defendants have been

negligent in performing the surgery on the deceased and have not taken care and caution which is expected of them. So much so, even the rudiments of performing surgery has been thrown to the winds. The pre-operative notes does not support the testimony of these witnesses.

The law applicable:

In the entirety of the evidence which has been led, it is necessary and essential to consider as to whether medical negligence in tort has been established by the plaintiffs. I have noticed here that the defendants were in possession of the best evidence dealing with the matter and onus would loose significance. The Hon'ble Supreme Court of India in ***Gopal Krishnaji Ketkar vs. Mohamed Haji Latif and others, AIR 1968 SC 1413,*** approving the decision of the ***Privy Council in Murugesam Pillai vs. Gnana Sambandha Pandara Sannadhi, 44 Ind Alpp 98 at p.103 = (AIR 1917 PC 6 at p.8),*** has held that irrespective of the onus and burden, the parties in possession of the best evidence should produce it. In the present case, the defendants, admittedly being in possession of this evidence, have led such evidence which cannot be discarded.

Admittedly, the defendants are the guardians of the record prepared by them and preserved and kept in safe custody with themselves. What is the plaintiff is required to do to such a situation? The

obvious answer would be to prove from this very record that a particular line of treatment which was required in prudent medical procedure/management has not been followed. It is also undisputed that whatever treatment/tests were carried out on the deceased, have been recorded in Ex.DW-1/A. The postmortem report and the Chemical Examiner Report Ex.DW-DW-5/A and DW-2/A cannot record this as the Chemical Examiner report deals only with the presence of poison in the human body and the postmortem report cannot be treated as recording the treatment given to the deceased except for opining with reference to the cause of death, since this report is prepared after the death of the patient. The first factor to be considered as to whether Ex.DW-1/A, which is the bed head ticket, reflects the entirety of the treatment given to the deceased or not. If not, how and under what circumstances were the sensitivity test carried out, who conducted the test, what was the quantity of anaesthesia administered on the deceased, what was the period between the test dose and the time of surgery, are important vital links which have not been recorded in the Ex.DW-1/A and the bald statement of DW-1 cannot be accepted that such tests were infact carried out. If they were, why were they not recorded in the bed head ticket? There is no answer. As held by me DW-2/D, the report of the expert committee, is not worth the paper on which it is written. It bases its

factual matrix on three documents DW-1/A, bed head ticket, DW-2/A, report of the Chemical Examiner and DW-5/A, the postmortem report. The conclusion in the report is based on anything but the existence of facts. A perusal of all these three documents shows that none of them records; (a) as to whether any sensitivity test was conducted; (b) the dose for testing sensitivity which was administered; (c) the dose of actual anaesthesia which was administered; (d) the observation period between the test dose and the time which elapsed for observing the reaction. Where and under what circumstances the Committee records that such test was conducted is not clear and infact, when confronted with these facts the defendants' witnesses admitted that none of the documents recorded these events/facts. In these circumstances, Ex.DW-2/D is to be rejected outright, as a document which is prepared on hypothesis without reference to any facts whatsoever.

The Hon'ble Supreme Court, ***in Jacob Mathew*** *vs.* ***State of Punjab and Another, (2005)6 SCC 1,*** has laid down in extenso the law dealing with the criminal negligence and actionable medical negligence in tort for the practitioner in the present petition, it is only in civil law the negligence of medical tort have to be considered. The Hon'ble Court holds as under:-

"Negligence by professionals"

*"**18.** In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised and exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be*

> *exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices. In Michael Hyde and Associates v. J.D. Williams & Co. Ltd., [2001] P.N.L.R. 233, CA, Sedley L.J. said that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable. (Charlesworth & Percy, ibid, Para 8.03)".*

Their Lordships further laid down the principles to be followed in judging medical negligence:-

> ***"47.** Before we embark upon summing up our conclusions on the several issues*

of law which we have dealt with hereinabove, we are inclined to quote some of the conclusions arrived at by the learned authors of "Errors, Medicine and the Law" (pp. 241-248), (recorded at the end of the book in the chapter titled "Conclusion") highlighting the link between moral fault, blame and justice in reference to medical profession and negligence. These are of significance and relevant to the issues before us. Hence we quote :-

(i) The social efficacy of blame and related sanctions in particular cases of deliberate wrongdoings may be a matter of dispute, but their necessity - in principle - from a moral point of view, has been accepted. Distasteful as punishment may be, the social, and possibly moral, need to punish people for wrongdoing, occasionally in a severe fashion, cannot be escaped. A society in which blame is overemphasized may become paralysed. This is not only because such a society will inevitably be backward-looking, but also because fear of blame inhibits the uncluttered exercise of judgment in relations between persons. If we are constantly concerned about whether our actions will be the subject of complaint, and that such complaint is likely to lead to legal action or disciplinary proceedings, a relationship of suspicious formality

between persons is inevitable. (ibid, pp. 242-243)

(ii) Culpability may attach to the consequence of an error in circumstances where substandard antecedent conduct has been deliberate, and has contributed to the generation of the error or to its outcome. In case of errors, the only failure is a failure defined in terms of the normative standard of what should have been done. There is a tendency to confuse the reasonable person with the error-free person. While nobody can avoid errors on the basis of simply choosing not to make them, people can choose not to commit violations. A violation is culpable. (ibid, p. 245).

(iii) Before the court faced with deciding the cases of professional negligence there are two sets of interests which are at stake : the interests of the plaintiff and the interests of the defendant. A correct balance of these two sets of interests should ensure that tort liability is restricted to those cases where there is a real failure to behave as a reasonably competent practitioner would have behaved. An inappropriate raising of the standard of care threatens this balance. (ibid, p.246). A consequence of encouraging litigation for loss is to persuade the public that all loss encountered in a medical context is the

result of the failure of somebody in the system to provide the level of care to which the patient is entitled. The effect of this on the doctor-patient relationship is distorting and will not be to the benefit of the patient in the long run. It is also unjustified to impose on those engaged in medical treatment an undue degree of additional stress and anxiety in the conduct of their profession. Equally, it would be wrong to impose such stress and anxiety on any other person performing a demanding function in society. (ibid, p.247). While expectations from the professionals must be realistic and the expected standards attainable, this implies recognition of the nature of ordinary human error and human limitations in the performance of complex tasks. (ibid, p. 247).

(iv) Conviction for any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high a standard traditionally described as gross negligence. In fact, negligence at that level is likely to be

indistinguishable from recklessness. (ibid, p.248).

(v) Blame is a powerful weapon. Its inappropriate use distorts tolerant and constructive relations between people. Distinguishing between (a) accidents which are life's misfortune for which nobody is morally responsible, (b) wrongs amounting to culpable conduct and constituting grounds for compensation, and (c) those (i.e. wrongs) calling for punishment on account of being gross or of a very high degree requires and calls for careful, morally sensitive and scientifically informed analysis; else there would be injustice to the larger interest of the society. (ibid, p. 248).

Indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to the society."

And ultimately in the concluding portion of the judgment their Lordships held:-

"Conclusions summed up"

"48. *We sum up our conclusions as under:-*

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs

would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: "duty", "breach" and "resulting damage".

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be

seen is whether those precautions were taken which the ordinary experience of men has found to e sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he

practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in Bolam's case [1957] 1 W.L.R. 582, 586 holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word "gross" has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be "gross". The expression "rash or negligent act" as occurring in Section 304A of the IPC

has to be read as qualified by the word "grossly".

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence".

Reverting to the facts of the present case the evidence may be considered in terms of the judgment of the Hon'ble Supreme Court. Under the second conclusion in para-48 *(supra)*, Their Lordships have been pleased to hold that negligence in the context of the medical profession calls for a

different treatment. Rashness or negligence cannot be inferred, and different considerations would apply. A simple lack of care, an error of judgment or an accident, cannot be treated as negligence. Their Lordships hold that so long as a doctor follows a practice acceptable to the medical profession, he cannot be held liable for negligence only on the ground that a better course of action is also available. More importantly, their Lordships hold:-

> *"…. …. …. …. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available that particular time (that is, the time of the incident) at which it is suggested it should have been used".*
>
> ***(para-48(2), pages 32-33)***

The Hon'ble Supreme Court in **Achutrao Haribhau Khodwa** vs. **State of Maharashtra, (1996)2 SCC 634,** while dealing with the degree of medical skill which was required for a medical practitioner and the negligence which would be actionable in tort has held:-

> *"A medical practitioner has various duties towards his patient and he must act with a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. This is the least which a patient expects from a doctor. The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence. But in cases*

> *where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action in tort would be maintainable".*

Similarly in **Spring Meadows Hospital** vs. **Harjol Ahluwalia, (1998) 4 SCC 39,** their Lordships of the Supreme Court have considered the distinction between an actionable claim for medical negligence and a bonafide mistake. It was held:-

> *"Very often in a claim for compensation arising out of medical negligence a plea is taken that it is a case of bona fide mistake which under certain circumstances may be excusable, but a mistake which would tantamount to negligence cannot be pardoned. In the former case a court can accept that ordinary human fallibility precludes the liability while in the latter the conduct of the defendant is considered to have gone beyond the bounds of what is expected of the skill of a reasonably competent doctor."*
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> ***(para-9, pages 46-47)***

These decisions were subsequently affirmed in ***Savita Garg(Smt)*** *vs.* ***Director, National Heart Institute, (2004) 8 SCC 56.*** I need not consider any other foreign precedent which has been cited by the learned counsel appearing for the parties since the law is by now very well settled by their Lordships of the Supreme Court. Applying the ratio of the

judgment, I find that the evidence on the record does not in any manner exonerate the defendants from their liability. As held by their Lordships in ***Achutrao Haribhau Khodwa's*** case, the defendants have failed to act with reasonable degree of skill, knowledge and care which is expected of a qualified medical practitioner. Of-course the skill of medical practitioners, dealing with a particular medical emergency, differs from doctor to doctor and he may act bonafide in different manner in order to render best treatment to the patient. But, in the present case, I find that negligence is of an actionable nature and all care and caution has been thrown to the winds. How is it possible for a patient to be taken for surgical procedure without testing the adverse affect of the anaesthesia to be administered? How is it possible that the procedure for testing as also the actual administration of the anaesthesia has not been recorded in the bed-head ticket? The only answer can be that this is culpable negligence which is actionable in law. Their Lordships are unequivocal in stating in ***Spring Meadows Hospital's*** case that a bonafide mistake under the circumstances may be excusable, but a mistake which would tantamount to negligence cannot be pardoned. I find that the present case is of a nature where the act of the doctor cannot be justified on any ground.

These principles have been reiterated in ***State of Haryana and Others*** *vs.* ***Smt.Santra, AIR 2000 SC 1888.*** Their Lordships have held:-

> ***"9.*** *Negligence is a `tort'. Every Doctor who enters into the medical profession has a duty to act with a reasonable degree of care and skill. This is what is known as `implied undertaking' by a member of the medical profession that he would use a fair, reasonable and competent degree of skill. In Bolam v. Friern Hospital Management Committee (1957)2 ALL ER 118, Mc Nair, J. summoned up the law as under:*
>
> > *"The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. There may be one or more perfectly proper standards, and if he conforms with one of these*

proper standards, then he is not negligent."

10. *This decision has since been approved by the House of Lords in Whitehouse v.Jordan (1981) I ALL ER 257 (HL); Maynard v.West Midlands Regional Health Authority (1985) 1 All ER 635 (HL); and Sidway v. Bathlem Royal Hospital (1985) 1 All ER 643 (HL).*

11. In two decisions rendered by this Court, namely, Dr.Laxman Balakrishna Joshi v. Dr.Trimbak Bapu Godbole, AIR 1969 SC 128 and A.S. Mittal v. State of U.P., AIR 1989 SC 1570, it was laid down that when a Doctor is consulted by a patient, the former, namely, the Doctor owes to his patient certain duties which are (a) a duty of care in deciding whether to undertake the case; (b) a duty of care in deciding what treatment to give; and (c) a duty of care in the administration of that treatment. A breach of any of the above duties may give a cause of action for negligence and the patient may on that basis recover damages from his Doctor. In a recent decision in Poonam Verma v. Ashwin Patel (1996) 4 SCC 382: Verma v.Ashwin Patel (1996) 4 SCC 382: AIR 1996 SC 2111: (1996 AIR SCW 2553) where the question of medical negligence was considered in the context of treatment of a patient, it was observed as under:

"40. Negligence has many manifestations – it may be active

negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence willful or reckless negligence or Negligence per se, which is defined in Black's Law Dictionary as under:

Negligence per se: Conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance, or because it is so palpably opposed to the dictates or common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes.

12. *It was also observed that where a person is guilty of Negligence per se, no further proof is needed.*

13. *In M/s.Spring Meadows Hospital v. Harjol Ahluwalia through K.s. Ahluwalia (1998)2 JT (SC) 620: (1998 AIR SCW 1590: Air 1998 SC*

1801), it was observed as under (para 9 of AIR):

> *"In the case in hand we are dealing with a problem which centres round the medical ethics and as such it may be appropriate to notice the broad responsibilities of such organizations who in the garb of doing service to the humanity have continued commercial activities and have been mercilessly extracting money from helpless patients and their family members and yet do not provide the necessary services. The influence exerted by a doctor is unique. The relationship between the doctor and the patient is not always equally balanced. The attitude of a patient is poised between trust in the learning of another and the general distress of one who is in a state of uncertainty and such ambivalence naturally leads to a sense of inferiority and it is, therefore, the function of medical ethics to ensure that the superiority of the doctor is not abused in any manner. It is a great mistake to think that*

doctors and hospital are easy targets for the dissatisfied patient. It is indeed very difficult to raise an action of negligence. Not only there are practical difficulties in linking the injury sustained with the medical treatment but also it is still more difficult to establish the standard of care in medical negligence of which a complaint can be made. All these factors together with the sheer expense of bringing a legal action and the denial of legal aid to all but the poorest operate to limit medical litigation in this country."

It was further observed as under (para 9 of AIR):

"In recent days there has been increasing pressure on hospital facilities, falling standard of professional competence and in addition to all, the ever increasing complexity of therapeutic and diagnostic methods and all this together the responsible for the medical negligence. That apart there has been a growing awareness in the public mind

to bring the negligence of such professional doctors to light. Very often in a claim for compensation arising out of medical negligence a plea is taken that it is a case of bona fide mistake which under certain circumstances may be excusable, but a mistake which would tantamount to negligence can not be pardoned. In the former case a court can accept that ordinarily human fallibility precludes the liability while in the latter the conduct of the defendant is considered to have gone beyond the bounds of what is expected of the reasonable skill of a competent doctor."

14. *In this judgment, reliance was placed on the decision of the House of Lords in Whitehouse v.Jordan (1981) 1 ALL ER 267. Lord Fraser, while reversing the judgment of Lord Denning (sitting in the Court of appeal), observed as under:*

"The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that

> *would not have been made by a reason ably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence."*
>
> ***15.*** *The principles stated above have to be kept in view while deciding the issues involved in the present case".*

Applying these tests, I find that this is not a case of simple alternate course of treatment being available or a lack of care or an error of judgment or an accident. Here is a case where it has not at all been established on the record as to how the anaesthesia was administered against all established medical practice; both as a test and a final dose and has not been recorded in the medical treatment chart Ex.DW-2/A. Considered from any angle, the conduct of the respondents cannot be condoned. Coupled with a fact that an all out attempt has been made to cover up lack of basic medical skill and negligence of the defendants, a report based on non-existent factual material, procured for the purposes

of exonerating the defendants, there can be no conclusion except that the defendants are outside the purview of the guidelines laid down by their Lordships of the Supreme Court exempting them from civil liability. A doctor performing surgery under anaesthesia has to explain why the reaction of anaesthesia etc. and dose of anaesthesia administered has not been recorded on the treatment chart. In the circumstances, judged from whatever angle, I find that the acts of the defendants are actionable in tort and cannot be justified. The other judgments of various high Courts, cited by the learned counsel, are not being considered in view of the law which has not been finally settled by the Hon'ble Supreme Court.

Quantum:

Coming to the question of compensation, the question is what is the amount which should be allowed as compensation to the plaintiffs? In the plaint, the plaintiffs have claimed a sum of Rs.3,50,000/- by way of compensation/damages on account of the death of Smt.Soma Devi caused by the negligence of the defendants.

Coming to the evidence, plaintiff No.1, Jagdish Ram, husband of the deceased Smt.Soma Devi, (PW-2) and PW-3 Smt.Kala Devi, made in law, have stated that the deceased was a house wife. The plaintiff has further stated that he was looking after the affairs of the entire family and bringing up their

four children. The age of the deceased has been recorded as 28 years in the bed-head ticket Ex.DW-1/A. These factors are not disputed before me.

In ***Lata Wadhwa and others*** *vs.* ***State of Bihar and others, (2001) 8 SCC 197,*** their Lordships of the Supreme Court have considered the quantum of compensation which is to be allowed to a lady who is working as a house wife. In this case, their Lordships while dealing with a case of death having been caused by the officers of the Tata Iron and Steel Company in negligence caused at a function held on 3.3.1989 at Jamshedpur. It was alleged that on the 150th birth anniversary of Sir Jamshedji Tata within the factory premises, a large number of employees and their families including small children had gathered, but no adequate safety measures had been taken. A devastating fire engulfed the VIP *Pandal* and the surrounding area resulting in the death and injuries of a number of persons. Their Lordships held:-

> *"8. So far as the determination of compensation in death cases is concerned, apart from the three decisions of the Andhra Pradesh High Court, which had been mentioned in the order of this Court dated 15.12.1993, this Court in the case of* ***G.M. Kerala SRTC*** *v.****Susamma Thomas (1994)2 SCC 176,*** *exhaustively dealt with the question. It has been held in the aforesaid case that for assessment of damages to compensate the dependants, it has to*

take into account many imponderables, as to the life expectancy of the deceased and the dependants, the amount that the deceased would have earned during the remainder of his life, the amount that he would have contributed to the dependants during that period, the chances that the deceased may not have lived or the dependants may not live up to the estimated remaining period of their life expectance, the chances that the deceased might have got better employment or income or might have lost his employment or income altogether. The Court further observed that the manner of arriving at the damages is to ascertain the net income of the deceased available for the support of himself and his dependants, and to deduct therefrom such part of his income as the deceased was accustomed to spend upon himself, as regards both self-maintenance and pleasure, and to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependants and, thereafter, it should be capitalized by multiplying it by a figure representing the proper number of years' purchase. It was also stated that much of the calculation necessarilky remains in the realm of hypothesis and in that region, arithmetic is a good servant but a bad master, since these are so often many

imponderables. In every case, "it is the overall picture that matters", and the court must try to assess as best as it can, the loss suffered. On the acceptability of the multiplier method, the Court observed:

> *"The multiplier method is logically sound and legally well-established method of ensuring a `just' compensation which will make for uniformity and certainty of the awards. A departure from this method can only be justified in rare and extraordinary circumstances and very exceptional cases."*

The Court also further observed that the proper method of computation is the multiplier method and any departure, except in exceptional and extraordinary cases, would introduce inconsistency of principle, lack of uniformity and an element of unpredictability in the assessment of compensation. The Court disapproved the contrary views taken by some of the High Courts and explained away the earlier view of the Supreme Court on the point. After considering a series of English decisions, it was held that the multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalizing the multiplicand by an appropriate multiplier. The

*choice of the multiplier is determined by the age of the deceased (or that of the claimants, whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed up over the period for which the dependency is expected to last". … … …

various stages in the estimate and the practical ways of dealing with them. In the case of ***Davies v. Taylor 1974 AC 207*** *it was held that the Court, in looking at future uncertain events, does not decide whether on balance one thing is more likely to happen than another, but merely puts a value on the chances. A possibility may be ignored if it is slight and remote. Any method of calculation is subordinate to the necessity for compensating the real loss. But a practical approach to the calculation of the damages has been stated by Lord Wright, in a passage which is frequently quoted, in* ***Davies v. Powell Duffryn Associated Collieries Ltd, (1942) 1 All ER 657 (HL****) to the following effect (All ER p.665 A-B)*

> *"The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase."*

"10. *So far as the deceased housewives are concerned, in the absence of any data and as the housewives were not earning any income, attempt has been made to determine the compensation on the basis of services rendered by them to the house. ON the basis of the age group of the housewives, appropriate multiplier has been applied, but the estimation of the value of services rendered to the house by the housewives, which has been arrived at Rs.12,000 per annum n cases of some and Rs.10,000 for others, appears to us to be grossly low. It is true that the claimants, who ought to have given data for determination of compensation, did not assist in any manner by providing the data for estimating the value of services rendered by such housewives. But even in the absence of such data and taking into consideration the multifarious services rendered by the housewives for managing the entire family, even on a modest estimation, should be Rs.3000 per month and Rs.36,000 per annum. This would apply to all those housewives between the age group of 34 to 59 and as such who were active in life. The compensation awarded, therefore, should be recalculated, taking the value of services rendered per annum to be Rs.36,000 and thereafter, applying the multiplier, as has bee applied already, and so far as the conventional amount is concerned,*

> *the same should be Rs.50,000 instead of Rs.25,000 given under the Report. So far as the elderly ladies are concerned, in the age group of 62 to 72, the value of services rendered has been taken at Rs.10,000 per annum and the multiplier applied is eight. Though, the multiplier applied is correct, but the values of services rendered at Rs.10,000 per annum, cannot be held to be just and, we, therefore, enhance the same to Rs.20,000 per annum. In their case, therefore, the total amount of compensation should be redetermined, taking the value of services rendered at Rs.20,000 per annum and then after applying the multiplier, as already applied and thereafter, adding Rs.50,000 towards the conventional figure".*

Their Lordships, therefore, considering the totality of the facts and circumstances of the case and also considering the fact that it would be difficult to estimate the income of housewives, held that a sum of Rs.36,000/- per annum would be the income. In the present case, considering that the age of the deceased was 28 years, a multiplier of 20 would have been basic minimum which could be applied while calculating this amount. To this, the conventional amount would be added. However, considering the fact that the plaintiffs have claimed only Rs.3,50,000/-, I take this as the estimated loss, which according to

them they would have suffered on the death of the deceased Smt.Soma Devi.

In the totality of the circumstances, this appeal is allowed, the judgment and decree of the Distt. Judge is set aside. I, therefore, award a sum of Rs.3,50,000/- in favour of the plaintiffs and against the defendants jointly and severely. The plaintiffs would also be entitled to interest at the rate of 8% per annum from the date of filing of the suit till its payment. The plaintiffs shall be entitled to costs of the suit as also this appeal.

Before concluding I must observe that the learned District Judge has mis-directed himself on the question of law and facts in the suit. He has not considered the evidence of the parties in its totality. While considering the case, it has been observed that the admitted case of both the parties is that the deceased Smt.Soma Devi was brought to Primary Health Centre, Kalol, where the surgery/operation was performed. The learned District Judge holds that the doctor accompanied the deceased to the District Hospital at Bilaspur where, First Information Report Ex.DW-5/A was lodged and the postmortem was conducted by a Board of Doctors who according to the learned District Judge very specifically opined that the ***death has been caused due to cardio-respiratory failure and due to shock.*** He seems to have been overawed by the report DW-2/D without at all considering that the postmortem report and the Chemical Examiner's report could not be the foundation of the defence as these

reports do not disclose the quantity of anaesthesia or its administration. There is no factual foundation or basis for the medical report submitted by the Committee of experts who completely ignored the bed-head ticket Ex.DW-1/A containing the entire record of medical treatment. He then reproduces passages from the judgment cited and holds that the plaintiffs have not been able to establish medical negligence. The consideration and analysis of the evidence by the learned trial Court is not at all satisfactory to say the least. If the learned District Judge had only cared to read the documents with more care and caution, it would have been plain that negligence was writ large in the acts of the defendants. The Hon'ble Supreme Court has time and again emphasized that a judgment should be reasoned, clear and precise. In ***Lakshmi Ram Bhuyan vs. Hari Prasad Bhuyan and Others, (2003) 1 SCC 197***, it was held:-

> *"10. Certain provisions of the Code of Civil Procedure, 1908 may be noticed. Order VII Rule 1 CPC requires the plaintiff to give sufficient particulars of the relief, which the plaintiff claims. Order XX requires a judgment to contain all the issues and findings or decision thereon with the reasons therefore. The judgment has to state the relief allowed to a party. The preparation of decree follows the judgment. The decree shall agree with the judgment. The decree shall*

contain, inter alia, particulars of the claim and shall specify clearly the relief granted or other determination of the suit. The decree shall also state the amount of costs incurred in the suit and by whom or out of what property and in what proportions such costs are to be paid. Rules 9 to 19 of Order XX are illustrative of contents of decrees in certain specified categories of suits. The very obligation cast by the Code that the decree shall agree with the judgment spells out an obligation on the part of the author of the judgment to clearly indicate the relief or reliefs to which a party, in his opinion, has been found entitled to enable decree being framed in such a manner that it agrees with the judgment and specifies clearly the relief granted or other determination of the suit. The operative part of the judgment should be so clear and precise that in the event of an objection being laid, it should not be difficult to find out by a bare reading of the judgment and decree whether the latter agrees with the former and is in conformity therewith. A self-contained decree drawn up in conformity with the judgment would exclude objections and complexities arising at the stage of execution.

11. The obligation is cast not only on the trial court but also on the appellate court. In the event of the suit having been decreed by the trial

> *court if the appellate court interferes with the judgment of the trial court, the judgment of the appellate court should precisely and specifically set out the reliefs granted and the modifications, if any, made in the original decree explicitly and with particularity and precision. Order XLI Rule 31 CPC casts an obligation on the author of the appellate judgment to state the points for determination, the decision thereon, the reasons for the decision and when the decree appealed from is reversed or varied, the relief to which the appellant is entitled. If the suit was dismissed by the trial court and in appeal the decree of dismissal is reversed, the operative part of the judgment should be so precise and clear as it would have been if the suit was decreed by the trial court to enable a self-contained decree being drawn up in conformity therewith.*
> *… … … … … … … … … … … … … … … … … … …. …"*

The learned District Judge has also completely ignored the evidence and testimony of PW-2 Jagdish Ram, husband of the deceased. He is very categoric when he states that the application form of sterilization Ex.DW-1/B has not been signed by the wife. Similarly, the so called payments which have been made to the deceased vide Ex.DW-1/C and Ex.DW-1/D also do not bear her signatures. The plaintiffs had produced on record the signatures (Ex.PW-1/A) of the

deceased from the custody of Shri Jagdish Chand, Record Keeper of UCO Bank, Ghumarwin, who has brought the same from the Saving Bank Account of the deceased. Surely, this was a factor which should have made the learned Court below to take notice that the records were being fabricated. There was a duty cast upon the trial Court to have examined the documents and to reach an independent conclusion to ascertain as to why the signatures did not tally. He had to consider these facts in the totality of the circumstances as to whether such fabrication in the documents had been made solely for the purpose of creating records to show that a large number of people had been motivated for undergoing the operation of vasectomy and tubectomy or it was an attempt made by the respondents to cover their negligence. I am not going into this aspect of the matter as I have already held that the defendants have been negligent in causing the death of Smt.Soma Devi. Nothing is clear from the judgment. Simply reproducing the evidence and the judgments cited at the Bar do not constitute a judgment on the issues urged before the Court.

June 18, 2007 **(Dev Darshan Sud)**
(aks) **Judge.**